Filed 9/4/13 A.R. v. Claremont Unified School Dist. CA2/5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

A.R., a minor, by and through her guardian ad litem, J.R., Plaintiff and Appellant, v. CLAREMONT UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B240947 (Los Angeles County Super. Ct. No. KC060255) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on August 13, 2013, be modified as follows:

1. On page 5, in the first full paragraph, starting on line 7 and ending on line 9, the following sentence is deleted. **It was responsible for the upkeep and maintenance of the restrooms adjacent to the athletic fields.**

2. On page 20, in the second full paragraph, the fifth sentence, starting on line 5 and ending on line 7, is modified to read as follows: **That agreement required CUSD to undertake a variety of duties with respect to the park including maintaining the athletic fields and scheduling field use.** The rest of the sentence is deleted.

The petition for rehearing is denied.

No change in judgment.

MOSK, J. KRIEGLER, J.

Filed 8/13/13 (unmodified version)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

A.R., a minor, by and through her guardian ad litem, J.R., Plaintiff and Appellant, v. CLAREMONT UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B240947 (Los Angeles County Super. Ct. No. KC060255)

APPEAL from a judgment of the Superior Court of Los Angeles County, R. Bruce Minto, Judge. Affirmed in part, reversed in part, and remanded.

Law Offices of Martin N. Buchanan, Martin N. Buchanan; Girardi | Keese, David N. Bigelow and Molly B. Weber for Plaintiff and Appellant.

Lynberg & Watkins, Ric C. Ottaiano, Courtney L. Hylton, and Patrick J. Kirby for Defendant and Respondent.

INTRODUCTION

A.R., a former Claremont High School (CHS) student brought an action against the Claremont Unified School District (CUSD), through her guardian ad litem, J.R., for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress alleging that CUSD failed to protect her from sexual victimization and rape by a fellow CHS student known by CUSD to have previously victimized another female student. The trial court granted CUSD's motion for summary judgment or summary adjudication (summary judgment motion) and A.R. appeals. We reverse on all issues except as to the causes of action for intentional infliction of emotional distress and negligent infliction of emotional distress. As to the other claims, there are triable issues of fact precluding summary adjudication.

BACKGROUND

T.S., a resident in the CUSD, first enrolled at CHS as a freshman in March 2007. In the 2008-2009 school year, when he was a junior, T.S. attended CHS pursuant to an Interdistrict Transfer Agreement with the Pomona Unified School District because he was no longer a resident in the CUSD. T.S. played football for CHS.

In about June 2008, T.S. and another male CHS student sexually assaulted R.R., a CHS student, one evening after summer school. A few weeks after the assault occurred, R.R. called a Kaiser advice nurse because she had "physical complications" from the assault. Shortly thereafter, a Claremont Police Department officer questioned R.R. and her mother, L.R., about the sexual assault. R.R. was afraid of T.S. and unable to confront what had happened to her, so she lied to the officer, telling him that the sexual encounter was consensual. In about July 2008, R.R. told her parents that T.S. had sexually assaulted her. Shortly thereafter, L.R. and R.R. told Coach Mike Lee, R.R.'s summer school teacher, that a then current CHS football player had "physically assaulted" R.R. Coach Lee did not question R.R. or take any official action in response to the information.

When R.R. returned to school for the 2008 fall semester, she found it very difficult to attend school with T.S. T.S. sexually harassed R.R. on a number of occasions. On one occasion, T.S. approached R.R. on campus and said that he needed her to have sex with his friend. In about October 2008, R.R. told her CHS counselor, Patricia Maddox, that "something bad of a sexual nature" had happened between R.R. and T.S. and another male CHS student. She cried and said that she was scared and did not want to be in the same classes with T.S. After the meeting, Maddox called L.R. and informed her that R.R. had told her what had happened. L.R. used T.S.'s full name during her conversation with Maddox, and it was apparent to L.R. that Maddox understood that T.S. had sexually assaulted her daughter.

Maddox contacted the school resource officer, Chris Bradley, a sworn peace officer who was employed jointly by the City of Claremont (City) and CUSD. She related to Officer Bradley what R.R. had reported to her. She gave him T.S.'s name, and asked him if he was aware of anything about which CUSD should be concerned. Officer Bradley said he would look into R.R.'s report. Less than a day later, Officer Bradley told Maddox that he had determined that whatever had occurred was consensual. According to Maddox, she and Officer Bradley determined that they had done all they could do.

A few weeks later, R.R. again met with Maddox. She said that she could not stand being at CHS with T.S. and needed to transfer to another high school. T.S., his sister, and his friends on campus had threatened and harassed her. R.R. often spent time in Maddox's office because she was too upset to attend class. In about December 2008, R.R.'s father, D.R., filled out an Interdistrict Attendance Permit Application at the CUSD office to allow his daughter to attend high school in another school district. As the reason for the transfer request, D.R. checked the "Special Circumstances" box and wrote, "Victim of sexual assault and sexual harassment. P.D. notified." D.R. turned in the completed form to CUSD personnel.

While he was at the CUSD office, D.R. spoke to Superintendent of Student Services Michael Bateman. Bateman did not ask D.R. to identify the facts or circumstances of the reported sexual assault or sexual harassment R.R. had suffered.

Bateman signed the Interdistrict Attendance Permit Application. After Bateman received R.R.'s Interdistrict Attendance Permit Application, he asked Officer Bradley to look into the allegations of sexual assault stated on the application. A few days later, Officer Bradley reported to Bateman that an investigation conducted the previous summer had determined that the sex involved was consensual. Officer Bradley identified T.S. as the accused. Bateman understood at that time that a minor female was not legally capable of having consensual sex. Bateman did not believe that CUSD had an obligation to investigate the matter further. No administrator of the school district questioned R.R. or her parents in relation to the events.

CHS Principal Brett O'Connor and Bateman helped R.R. transfer to another high school. R.R. began classes at her new high school in the spring 2009 semester. Before the 2009-2010 school year, D.R. filled out an Interdistrict Transfer renewal form for his daughter. He listed the same reasons for the transfer that he had listed on the Interdistrict Attendance Permit Application. CUSD approved the 2009-2010 renewal form.

During the 2009-2010 school year, A.R. was a 14-year-old ninth grade student at CHS. CHS permitted students to choose one of two class schedules—zero period through sixth period, or first period through seventh period. A.R. enrolled in the zero period through sixth period schedule to participate more easily in CHS's extracurricular sports programs.

During the first semester of the 2009-2010 school year, A.R. participated in CHS's cross country program which met for practice after seventh period classes ended. Because her classes ended with sixth period, A.R. was not required to remain on campus during seventh period to wait for cross country practice to begin. When the cross country season ended, A.R. participated in CHS's pre-season track program, which had the same practice schedule as the cross country program. As during cross country season, A.R. was not required to remain on campus during seventh period to wait for track practice to begin.

January 25, 2010, was the first official day of track practice. That day, A.R. remained on campus after her sixth period class ended to wait for track practice to begin.

As she waited, A.R. received a text message from T.S., a senior CHS student with whom she was acquainted. A.R. had met T.S. at the football field one day; he told her she had "pretty eyes." Thereafter, although A.R. and T.S. occasionally exchanged text messages, A.R. never saw T.S. outside of school hours or school-sponsored activities. Like A.R., T.S. did not have a seventh period class. T.S. asked A.R. to meet him at Cahuilla Park.

Cahuilla Park, a public park contiguous to the CHS campus, was owned by the City. The CHS campus was open to Cahuilla Park—although the campus and park were separated by a chain link fence, there were no gates or other barriers at the park's entrances. CUSD had an agreement with the City pursuant to which CUSD was the primary manager/operator of two softball fields and one baseball field at the park. Under the agreement, CUSD was to "make facility improvements, oversee routine maintenance, and allocate the community fields for adult softball, field rentals, and pick-up games." It was responsible for the upkeep and maintenance of the restrooms adjacent to the athletic fields. CUSD was to administer scheduling, invoicing, and collecting of fees for field use; to compensate the City for field lighting and watering costs; and to reimburse the City for field use revenue. It agreed to not to use or allow the athletic fields to be used in any manner that violated any law and to "exercise reasonable care in the use" of the athletic fields.

During the 2009-2010 school year, the CHS baseball, softball, track, and cross country teams used Cahuilla Park. A.R. believed the park was part of the CHS campus—as part of freshman orientation, A.R. and other students were given a tour of the school, which included Cahuilla Park. During the tour of the park, A.R. and the other students were told they could use the Youth Activity Center, a park facility, before and after school and during seventh period. No one at CHS told A.R. that the park was not part of the campus.

A.R. met T.S. on the bleachers near Cahuilla Park's baseball field. A.R. did not see anyone else in the park. A.R. and T.S. spoke for a short time before it started to rain. They walked toward nearby restrooms to get out of the rain. Once they arrived at the restrooms, T.S. proceeded as if he were going to enter the restrooms. A.R. said she

would not go into the restrooms with T.S. He told her not to worry, saying, "It's raining. I promise I won't try anything." A.R. believed T.S. and entered the women's restroom with him. Once inside the women's restroom, T.S. raped A.R.

After the sexual assault, A.R. was bleeding from her vagina. She returned to the CHS campus where she changed out of her bloody pants into a friend's sweat pants. She changed into her own track shirt and attended track practice at the CHS track. The track was on the CHS campus and not in Cahuilla Park. A.R. bled from the rape for about two to three days and suffered severe emotional distress.

On February 4, 2010, A.R. was called out of class to meet with CHS Assistant Principal, Student Services Sharon Fera. Fera was investigating a claim by another student that she and A.R. had been raped by T.S. A.R. told Fera about the sexual assault in Cahuilla Park. Fera immediately contacted the Claremont Police Department and A.R.'s parents. T.S. was arrested on campus that day. At a meeting with A.R.'s parents, Fera described T.S. as a nice kid who preyed on vulnerable girls like their daughter. A.R.'s parents immediately removed A.R. from CHS, and she transferred to a school outside of the CUSD.

On February 5, 2010, CUSD suspended T.S. for the five-day period between February 5, 2010, to February 11, 2010, based on the incident on January 25, 2010. The grounds for the suspension were committing or attempting to commit a sexual assault in violation of Education Code section 48900, subdivision (k) and disrupting school activities in violation of Education Code section 48915, subdivision (c)(4) while under the jurisdiction of the school. Effective February 11, 2012, CUSD revoked T.S.'s interdistrict transfer and, ultimately, expelled T.S.

A.R. filed a Liability Claim Form with CUSD dated May 24, 2010, relating to her January 25, 2010, sexual assault. The claim was for "Physical and emotional injuries resulting from rape." A.R. stated that she was "raped in the bathroom adjacent to the baseball field by another Claremont High School student known to officials of the Claremont Unified School District to pose such a danger." The location where the injury occurred was identified as "Cuhuilla [*sic*] Park/Claremont High School." The claim

stated that CUSD caused the injury because "Claremont High school negligently allowed the assailant to continue to attend Claremont High School knowing that he posed a serious danger to female students." On June 24, 2010, the Board of Education met and rejected A.R.'s claim without discussion.

PROCEDURAL HISTORY

CUSD filed a summary judgment motion. The trial court granted the motion. It ruled that A.R. could not bring certain theories of liability not asserted in the liability claim form she filed with CUSD. As to A.R.'s claim that CUSD was negligent in admitting T.S. to CHS pursuant to an interdistrict transfer application and in its failure to discipline, suspend, or expel him following his alleged sexual assault of R.R., the trial court ruled that CUSD was entitled to discretionary immunity under Government Code section 820.2 (section 820.2). The trial court ruled that CUSD was entitled to immunity under Education Code section 44808 (section 44808) as to each of A.R.'s causes of action because A.R.'s injuries occurred off school grounds, after she was released from class, and while CUSD was not using Cahuilla Park for a school purpose. Finally, the trial court ruled that there was no triable issue of material fact as to A.R.'s claim that there was a dangerous condition on CUSD's property.[1]

DISCUSSION

A.R. claims that the trial court erred in granting summary judgment. As set forth below, the trial court erred in part.

I. Standard of Review

"We review the grant of summary judgment de novo. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19 [17 Cal.Rptr.2d 356].) We make 'an independent assessment of the correctness of the trial court's ruling, applying the same

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[1] A.R. does not appeal from the trial court's ruling as to the dangerous condition claim.

legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222 [38 Cal.Rptr.2d 35].) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 853 [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1216–1217.) We must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 843.)

II. Liability Claim Form

In its summary judgment motion, CUSD argued that A.R.'s action was limited to the theory of liability A.R. asserted in the liability claim form she filed with CUSD—i.e., that CUSD was negligent in allowing T.S. to continue to attend CHS knowing that he posed a serious danger to female students. The trial court ruled that A.R.'s action was limited to the single theory asserted in the liability claim form. A.R. contends that the trial court erred because the factual allegations in her liability claim form adequately gave notice to CUSD of all theories of liability asserted in the second amended complaint. The trial court erred in part.

A. A.R.'s Liability Claim Form and Second Amended Complaint

A.R.'s attorney filed a pre-printed CUSD liability claim form on A.R.'s behalf. In the claim form, A.R. identified the location where her injury occurred as "Cuhuilla [*sic*]

Park/Claremont High School." As to the circumstances under which she was injured, she stated, A.R., a "freshman student at Claremont High School, was raped in the bathroom adjacent to the baseball field by another Claremont High School student known to officials of the Claremont Unified School District to pose such a danger." The form asked, "WHAT particular act or omission on the part of the District's officers or employees caused the alleged injury or damage?" A.R. responded, "Claremont High School negligently allowed the assailant to continue to attend Claremont High School, knowing that he posed a serious danger to female students." A.R. stated that her claimed damages were "Physical and emotional injuries resulting from rape."

In her second amended complaint, A.R. asserted causes of action for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. A.R. alleged that CUSD had a duty to supervise her while she was on campus, and to supervise T.S. while he was on and around campus for her safety and the safety other female students. She further alleged that CUSD failed adequately to fence its property or erect barriers to prevent easy access to Cahuilla Park, and failed to prevent dangerous conditions on its property and on property adjacent thereto—i.e., Cahuilla Park. A.R. alleged that CUSD was negligent, among other things, in permitting T.S. to remain enrolled at CHS despite its knowledge that he previously sexually assaulted another 14-year-old CHS female student; in failing to discipline T.S.; in failing to warn CHS administrators, teachers, and staff about T.S. so that they could prevent him from sexually pursuing and raping A.R.; and in failing to implement reasonable safeguards to prevent T.S. from engaging in acts of unlawful sexual conduct.

B. Application of Relevant Principles

Government Code section 945.4 (section 945.4)[2] provides that "no suit for money or damages may be brought against a public entity on a cause of action for which a claim

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[2] Section 945.4 provides in full: "Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing

is required to be presented in accordance with . . . Section 910 . . . until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board . . . ." A claim under Government Code section 910 (section 910)[3] must state the "date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted" and provide a "general description of the . . . injury . . . incurred so far as it may be known at the time of presentation of the claim."

"The purpose of these statutes is 'to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation.' [Citation.] Consequently, a claim need not contain the detail and specificity required of a pleading, but need only 'fairly describe what [the] entity is alleged to have done.' [Citations.] As the purpose of the claim is to give the government entity notice sufficient for it to investigate and evaluate the claim, not to

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with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division."

[3] Section 910 provides in full: "A claim shall be presented by the claimant or by a person acting on his or her behalf and shall show all of the following:

"(a) The name and post office address of the claimant.

"(b) The post office address to which the person presenting the claim desires notices to be sent.

"(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.

"(d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.

"(e) The name or names of the public employee or employees causing the injury, damage, or loss, if known.

"(f) The amount claimed if it totals less than ten thousand dollars ($10,000) as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. If the amount claimed exceeds ten thousand dollars ($10,000), no dollar amount shall be included in the claim. However, it shall indicate whether the claim would be a limited civil case."

eliminate meritorious actions [citation], the claims statute 'should not be applied to snare the unwary where its purpose has been satisfied' [citation]." (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 446 (*Stockett*).)

"If the claim is rejected and the plaintiff ultimately files a complaint against the public entity, the facts underlying each cause of action in the complaint must have been fairly reflected in a timely claim. [Citation.]" (*Stockett, supra,* 34 Cal.4th at p. 447.) "The claim, however, need not specify each particular act or omission later proven to have caused the injury. [Citation.] A complaint's fuller exposition of the factual basis beyond that given in the claim is not fatal, so long as the complaint is not based on an 'entirely different set of facts.' [Citation.] Only where there has been a 'complete shift in allegations, usually involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim,' have courts generally found the complaint barred. [Citation.] Where the complaint merely elaborates or adds further detail to a claim, but is predicated on the same fundamental actions or failures to act by the defendants, courts have generally found the claim fairly reflects the facts pled in the complaint. [Citation.]" (*Ibid.*)

In *Stockett, supra,* 34 Cal.4th 441, the plaintiff filed a tort claim form alleging that his employer, a public agency that provided insurance and risk management services to nearly 300 public water agencies in California, had wrongfully terminated him for supporting a female employee's sexual harassment complaints. (*Id.* at p. 444.) He then filed a civil action in which he asserted that he was terminated in violation of public policy on three grounds: (1) he had opposed sexual harassment in the workplace, (2) he had objected to a conflict of interest concerning his employer's purchase of insurance, and (3) he exercised his First Amendment right of free speech by objecting to his employer's practice of not purchasing insurance in a manner that would have been in the best interests of its member agencies. (*Ibid.*) At trial, the plaintiff also alleged that he had been fired for exercising his free speech right in statement he made to an insurance industry newsletter. (*Id.* at p. 445.)

The California Supreme Court held that the plaintiff's tort claim form complied with sections 910 and 945.4 because the claim stated the date and place of his termination, his employer's officers and agents who he believed were responsible for his wrongful termination, and the general circumstances of his termination. (*Stockett, supra,* 34 Cal.4th at p. 447.) The court stated that the plaintiff had not changed the fundamental facts underlying his claim of wrongful termination—the free speech and conflict of interest theories only added detail to his claim by alleging additional motivations and reasons for his employer's single action of wrongful termination. (*Id.* at p. 448.)

The court held that by notifying his employer of his claim that he had been wrongfully terminated and identifying those allegedly involved, the plaintiff had supplied his employer with sufficient information to investigate and evaluate the merits of the claim. (*Stockett, supra,* 34 Cal.4th at p. 449.) The court reasoned that "a reasonable investigation of a wrongful termination claim would not be limited to the motives for termination hypothesized in the fired employee's claim form." (*Ibid.*) "A reasonable investigation by the [employer] would have included questioning members of the committee [that terminated the plaintiff] to discover their reasons for terminating [him] and an evaluation of whether any of the reasons proffered by the committee, including but not limited to the theories in [the plaintiff's] claim, constituted wrongful termination." (*Ibid.*) Thus, the court held, the plaintiff's "notice of claim satisfied the purposes of the claims statutes by providing sufficient information for the public entity to conduct an investigation into the merits of the wrongful termination claim, and the complaint's free speech and conflict of interest theories of termination in violation of public policy were fairly reflected in the claim because the complaint did not change the fundamental facts of the claim." (*Id.* at p. 450.)

Although stated in a single cause of action, it appears that A.R.'s negligence cause of action is based on the following theories of liability[4]: (1) CUSD allowed T.S. to

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[4] In connection with her argument that the trial court erred in finding section 820.2 discretionary immunity, A.R. argued that there was no immunity for CUSD's negligence in investigating R.R.'s complaint that T.S. sexually assaulted her. A.R. did not allege

continue to attend CHS knowing that he posed a serious danger to female students, (2) CUSD failed to supervise A.R. and T.S. properly, (3) CUSD failed to inform—i.e., to warn—T.S.'s teachers about his sexual assault of R.R.[5], and (4) CUSD permitted a dangerous condition to exist on its property. CUSD contends that only the first theory was raised in A.R.'s liability claim form and that A.R. thus was barred from proceeding on the remaining theories. Because the trial court granted CUSD's summary judgment motion as to A.R.'s dangerous condition theory on other grounds that A.R. does not appeal, we need not address the trial court's liability claim form ruling as to the dangerous condition theory. As for A.R.'s theories that CUSD was negligent in failing to supervise A.R. and T.S. properly and in failing to inform or warn T.S.'s teachers about his sexual assault of R.R., they were fairly reflected in A.R.'s liability claim form. (*Stockett, supra,* 34 Cal.4th at p. 447.)

A.R.'s liability claim form asserted that A.R. was raped by a CHS student known to CUSD officials to pose a danger of rape. The specific charge of negligence in A.R.'s liability claim form was that CUSD "negligently allowed the assailant to continue to attend Claremont High School, knowing that he posed a serious danger to female students." The notice provided by that charge was that CUSD failed to take steps to protect A.R. and other CHS female students from sexual assault by a CHS student known to pose a risk of sexual assault. A reasonable investigation of such a charge would have addressed whether those steps should have included, and whether A.R.'s rape could have been prevented by better supervision of A.R. and T.S. and by informing T.S.'s teachers of his sexual assault of R.R. so they could monitor his behavior. (*Stockett, supra,* 34 Cal.4th at p. 449.) Accordingly, the trial court erred in granting CUSD's summary judgment

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specifically such a theory of liability in the claim form or in her second amended complaint.

[5] Although the statutory basis for this theory of liability is not expressly identified in the second amended complaint, it appears to be based on the mandatory duty to inform a student's teacher if the student has committed or attempted to commit a sexual assault or battery in Government Code section 815.6 and Education Code section 49079.

motion as to A.R.'s alternative negligence theories. Section 910 requires only that the claim form include the date, place, and other circumstances of the occurrence; a general description of the injury, damage, or loss; and the names of the public employee or employees causing the injury if known. CUSD added an additional question. The answer to that question cannot limit liability to that asserted in the response to a question requiring more information than required by the statute. (*Blair v. Superior Court* (1990) 218 Cal.App.3d 221, 225.)

As for A.R.'s intentional infliction of emotional distress cause of action, the trial court did not err. There is no information in A.R.'s liability claim form that would have put CUSD on notice that any of its employees had engaged in intentional conduct with respect to A.R. designed to inflict emotional distress. Because such a cause of action represents a "'complete shift in allegations,'" the trial court properly ruled that the cause of action was barred. (*Stockett, supra,* 34 Cal.4th at p. 447.) As to A.R.'s negligent infliction of emotional distress cause of action, the trial court appears to have ruled that A.R. could assert that claim as an element of damages for her negligence cause of action but not as a separate cause of action. A.R. has not appealed that ruling.

III. Section 820.2 Immunity

The trial court granted CUSD's summary judgment motion as to its argument that the discretionary immunity in section 820.2[6] shielded it from liability with respect to A.R.'s claim that it was negligent in admitting T.S. to CHS pursuant to an interdistrict transfer application and in its failure to discipline, suspend, or expel T.S. following his alleged sexual assault of R.R.[7] A.R. correctly argues that the trial court erred because

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6 Section 820.2 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

7 CUSD's claim of immunity should have been asserted under Government Code section 815.2 which provides: "(a) A public entity is liable for injury proximately caused

CUSD failed to show that any CHS employee actually exercised discretion within the meaning of section 820.2 in admitting or failing to discipline, suspend, or expel T.S.

A. The Trial Court's Ruling

The trial court ruled that there was no triable issue of material fact with respect to the application of the discretionary immunity in section 820.2 to A.R.'s claim that CUSD was negligent in admitting T.S. to CHS or in failing to discipline, suspend, or expel him. It also ruled, however, that the immunity did not cover all potential theories of liability that A.R. alleged in the second amended complaint, identifying specifically the apparent theory that CUSD violated its mandatory duty, under Government Code section 815.6 and Education Code section 49079, to report T.S.'s alleged sexual assault of R.R. to his teachers.

B. Application of Relevant Legal Principles

"Under the California Tort Claims Act ([Gov. Code,] § 810 et seq.), public employees are liable for their torts unless a statute provides otherwise. ([Gov. Code,] § 820, subd. (a).) One exception to this general rule of liability is found in section 820.2, which codifies the common law immunity for the discretionary acts of a government official performed within the scope of his or her authority. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 979-980 [42 Cal.Rptr.2d 842, 897 P.2d 1320] (*Caldwell*).)" (*Barner v. Leeds* (2000) 24 Cal.4th 676, 682-683 (*Barner*).)

However, "not all acts requiring a public employee to choose among alternatives entail the use of 'discretion' within the meaning of section 820.2." (*Barner, supra,* 24 Cal.4th at pp. 684-685, citing *Caldwell, supra,* 10 Cal.4th at p. 981.) "Immunity is

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by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

reserved for those '*basic policy decisions* [which have] . . . been [expressly] committed to coordinate branches of government,' and as to which judicial interference would thus be 'unseemly.' [Citation.] Such 'areas of quasi-legislative policy-making . . . are sufficiently sensitive' [citation] to call for judicial abstention from interference that 'might even in the first instance affect the coordinate body's decision-making process' [citation].'" (*Caldwell, supra,* 10 Cal.4th at p. 981, citing *Johnson v. State of California* (1968) 69 Cal.2d 782, 793-794 (*Johnson*).)

"On the other hand, . . . there is no basis for immunizing lower-level, or 'ministerial,' decisions that merely implement a basic policy already formulated. [Citation.] Moreover, . . . immunity applies only to *deliberate and considered* policy decisions, in which a '[conscious] balancing [of] risks and advantages . . . took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision. [Citations].' [Citation.]" (*Caldwell, supra,* 10 Cal.4th at p. 981, citing *Johnson, supra,* 69 Cal.2d at pp. 795, fn. 8 & 796.) The burden of proof to show that section 820.2 discretionary immunity applies is on the public entity claiming the immunity. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 794 (*Lopez*) ["to avail itself of the discretionary immunity provided by section 820.2, a public entity must prove that the employee, in deciding to perform (or not to perform) the act which led to plaintiff's injury, *consciously exercised discretion* in the sense of assuming certain risks in order to gain other policy objectives"].)

Admissions decisions and decisions about whether to expel a student may receive discretionary immunity under section 820.2. (*Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1361 (*Thompson*); *Skinner v. Vacaville Unified School Dist.* (1995) 37 Cal.App.4th 31, 39 (*Skinner*).) In *Thompson,* a high school student was injured when he was punched by another student who previously had been expelled from the school district's middle school. (*Thompson, supra,* 107 Cal.App.4th at pp. 1358-1359.) The injured student argued that the school district should not have readmitted the offending student to the district's public schools following his

expulsion. (*Id.* at p. 1361.) The Court of Appeal held that "[a] school district's exercise of authority to expel and/or readmit a pupil involves the type of decision that entails '"the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination."' [Citations.]" (*Ibid.*)

In *Skinner*, a male high school student punched a female high school student in the face, breaking her jaw. (*Skinner, supra,* 37 Cal.App.4th at pp. 34-35.) Prior to the incident, the male student had been suspended on various occasions for violent behavior. (*Id.* at p. 36.) The Court of Appeal held that the jury's verdict in favor of the female student could not be supported by the school district's failure to expel the male student before the incident. (*Id.* at p. 39.) The court reasoned, "The power to expel students from public schools has been entrusted to the governing board of the school district, which must exercise this power pursuant to statutory guidelines (Ed. Code, §§ 48912-48915.5) and its own rules and regulations. (Ed. Code, § 48918.) Accordingly, the decision falls squarely within the discretionary immunity provision of Government Code section 820.2. The decision to expel entails 'the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination.' [Citation.]" (*Ibid.*)

Although an admission decision may involve discretion and thus be entitled to section 820.2 discretionary immunity when it involves the "resolution of policy considerations" (see *Thompson, supra,* 107 Cal.App.4th at p. 1361), CUSD failed to establish that Bateman made a "deliberate and considered" policy decision—i.e., that he actually exercised discretion in determining whether T.S. satisfied the interdistrict transfer requirements (*Caldwell, supra,* 10 Cal.4th at p. 981.) At his deposition, Bateman testified that he was responsible for verifying eligibility for interdistrict transfer students, including T.S., for the 2008-2009 school year. Bateman believed that he received T.S.'s interdistrict transfer application in September 2008. In order to verify T.S.'s eligibility, Bateman checked if T.S.'s grades, attendance, and behavior were satisfactory. T.S. had to have a minimum 2.0 grade point average. "Good behavior" meant that T.S. had not been recommended for expulsion and was not a constant disruption at school. Bateman

relied on a student database and a letter of recommendation from the school to determine if T.S. met the eligibility requirements. Bateman's deposition testimony makes clear that his role in verifying T.S.'s eligibility status for an interdistrict transfer was at most a "lower-level 'or ministerial'" decision that did not involve the exercise of discretion. (*Ibid.*) Indeed, in its summary judgment motion, CUSD reached the same conclusion, arguing that it did not have the "power"—i.e., the discretion—as a public high school to deny T.S. admission because he "undisputedly" "met the criteria for attendance." Accordingly, the trial court erred in ruling as a matter of law that section 820.2 discretionary immunity applied to the decision to admit T.S. to CHS. (*Ibid.*; *Lopez, supra,* 40 Cal.3d at p. 794.) Moreover, even if the act of a public employee can be classified as discretionary, that does not immunize him from liability for negligently performing an act after having exercised a discretionary decision to do so. (*McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 261.) Here, even if the act of allowing T.S. to remain in school were discretionary, there was a triable issue of fact as to the negligence in the investigation.

Although Bateman's deposition testimony was at least some evidence about CUSD's decision to admit T.S. pursuant to an interdistrict transfer application, CUSD has not cited any evidence about the decision, if any, of any CHS employee about whether or not to discipline, suspend, or expel T.S. after R.R. and her parents repeatedly informed CHS officials of T.S.'s alleged sexual assault of R.R. Because CUSD failed to meet its burden of proof on this issue, the trial court erred in determining discretionary immunity under section 820.2 at the summary judgment stage (*Caldwell, supra,* 10 Cal.4th at p. 981; *Lopez, supra,* 40 Cal.3d at p. 794.)

IV. Section 44808 Immunity

A.R. contends that the trial court erred in finding CUSD immune, under section 44808, from liability for her sexual assault because her injuries occurred off school grounds, after she was released from class, and while CUSD was not using Cahuilla Park for a school purpose. We agree.

A. The Trial Court's Ruling

The trial court ruled that there was no triable issue of fact that CHS owned Cahuilla Park or that the park was within the school's boundaries. It also ruled, however, that there was a triable issue of fact concerning whether Cahuilla Park was at times de facto school grounds because the park was adjacent to CHS and the school regularly used the park for activities that are generally considered to be traditional school or extracurricular activities such as football and baseball team practices. The trial court further ruled there was a triable issue of fact about whether CHS's actions with respect to Cahuilla Park could at times fit within the "specific undertaking" exception to the section 44808 immunity. Notwithstanding its conclusions concerning triable issues of fact, the trial court ruled that CUSD was entitled to section 44808 immunity as to all of A.R.'s claims. The trial court reasoned that even if Cahuilla Park was at times a de facto part of the school's grounds or used for a specific undertaking by the school, those exceptions to section 44808 immunity applied only while the park was being used as de facto school grounds or for the specific undertaking. There was no triable issue of fact that Cahuilla Park was being used during CHS's seventh period, during which period T.S. sexually assaulted A.R., or immediately thereafter for any school activity. Even though A.R. was going to attend track practice immediately after seventh period, that activity took place on CHS's traditional school grounds and not in Cahuilla Park.

B. Application of Relevant Legal Principles

"It is well settled that although a school district is not an insurer of its pupils' safety, school authorities have a duty to supervise the conduct of students on school grounds and to enforce rules and regulations necessary for their protection. [Citation.] The standard of due care imposed on school authorities in exercising their supervisorial responsibilities is that degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances. [Citation.]" (*Brownell v. Los Angeles Unified School Dist.* (1992) 4 Cal.App.4th 787, 795-796 (*Brownell*).) Thus, a school district that is negligent in the exercise of due care in supervising its

students on school premises is liable for injuries proximately caused by its negligence. (*Perna v. Conejo Valley Unified School Dist.* (1983) 143 Cal.App.3d 292, 295 (*Perna*).) Proximate cause is a question of fact for the jury. (*Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 520 (*Hoyem*); *Perna*, *supra*, 143 Cal.App.3d at p. 296.)

Section 44808 grants school districts immunity from liability for off-campus injuries students suffer under certain circumstances. (*Hoyem, supra,* 22 Cal.3d at pp. 516-517.) Section 44808 provides: "Notwithstanding any other provision of this code, no school district, city or county board of education, county superintendent of schools, or any officer or employee of such district or board shall be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district, board, or person has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances. [¶] In the event of such a specific undertaking, the district, board, or person shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board."

There is at least a triable issue of fact about whether Cahuilla Park was part of the CHS campus at the time T.S. raped A.R. in the park's restroom. The park was contiguous to the traditional CHS campus. There was easy access from CHS into the park. Under the agreement with the City, CUSD managed and operated the athletic fields at the park. That agreement required CUSD to undertake a variety of duties with respect to the park including maintaining the athletic fields, scheduling field use, and maintaining the restrooms adjacent to the fields—i.e., the restrooms where T.S. raped A.R. Among other things, CUSD agreed to "exercise reasonable care in the use" of the athletic fields. In CHS's freshman orientation for the 2009-2010 school year, A.R. and other students were given a tour of the park as part of their tour of CHS. A.R. and other students on the tour were told they could use the park's Youth Activity Center before and after school

and during seventh period—i.e., the school period during which T.S. raped A.R. No one at CHS told A.R. that the park was not part of the campus. During the 2009-2010 school year, CHS used the park's athletic fields for its baseball, softball, track, and cross country teams. In its letter to T.S.'s parents explaining T.S.'s suspension for disrupting school activities and committing or attempting to commit a sexual assault, CUSD stated the incident occurred "while under the jurisdiction of the school . . . ." CUSD determined that T.S. had disrupted school activities because neither he nor A.R. had gone home prior to the incident.

Moreover, even if Cahuilla Park was not part of the CHS campus at the time of the sexual assault, a school district that has been negligent in the supervision of a student on school premises "cannot automatically escape liability simply because the injury occurred off the school property," notwithstanding section 44808's immunity for off-campus injuries. (*Perna, supra,* 143 Cal.App.3d, 295; *Hoyem, supra,* 22 Cal.3d at p. 517; *Hoyem, supra,* 22 Cal.3d at p. 515 ["the off-campus situs of an injury does not ipso facto bar recovery from a school district"].) Rather, the school district may be held liable for injuries its student suffered off school premises and after school hours when the injury resulted from the school district's negligence while the student was on school premises. (*Brownell, supra,* 4 Cal.App.4th at p. 795; *Hoyem, supra,* 22 Cal.3d at pp. 515-516; *Perna, supra,* 143 Cal.App.3d at p. 296.) The facts and the courts' analyses in *Hoyem, Perna,* and *Brownell* illustrate this principle.

In *Hoyem, supra,* 22 Cal.3d 508, a 10-year-old boy attending summer school left school grounds before the end of scheduled classes and was hit by a motorcycle. (*Id.* at p. 512.) The student claimed that the school district was negligent in supervising him while on school premises—i.e., in failing to prevent him from leaving—and that the school district's negligence proximately caused his injuries. (*Id.* at pp. 513-514.) The Supreme Court held that section 44808 did not immunize the school district from the boy's claim that his off-campus injuries resulted from the school district's negligent on-campus supervision. (*Id.* at pp. 515-517.)

In *Perna, supra,* 143 Cal.App.3d 292, a teacher asked a student to stay after school and help grade papers. (*Id.* at p. 294.) When the student and her sister left campus, the school crossing guard was no longer on duty. (*Ibid.*) The sisters were hit by a car as they crossed the intersection. (*Ibid.*) They brought an action for negligence against the school district alleging that the teacher knew or reasonably should have known that the crossing guard would be gone from the intersection where they would cross on their way home. (*Ibid.*) The school district argued that it was immune from liability under 44808 because "the student was not on school property and was injured during hours when school was not in session." (*Perna, supra,* 143 Cal.App.3d at pp. 294-295.) Following *Hoyem*, the Court of Appeal held that the student stated a cause of action for negligence based on the school district's on-campus conduct without regard to the situs of the injury. (*Ibid.*)

In *Brownell, supra,* 4 Cal.App.4th 787, a student was shot by gang members on a public street adjacent to school property immediately after school hours. (*Id.* at p. 790.) The student sued the school district alleging negligent supervision based on school personnel's failure to determine if the street in front of the school was free of gang members. (*Id.* at p. 790.) In its defense, the school district argued that under section 44808 it was not liable for the student's injuries as they occurred after school and off school property. (*Brownell, supra,* 4 Cal.App.4th at p. 794.) Citing *Hoyem, supra,* 22 Cal.3d at pages 515 through 516, the court rejected the school district's defense, holding that "under certain circumstances a school district may be held liable for injuries suffered by a student off school premises and after school hours where the injury resulted from the school's negligence while the student was on school premises." (*Brownell, supra,* 4 Cal.App.4th at p. 795.)

In her second amended complaint, A.R. alleged that CUSD was negligent, among other things, in permitting T.S. to remain enrolled at CHS despite its knowledge that he previously sexually assaulted another 14-year-old CHS female student and presented an imminent and serious danger to all female students at CHS. That is, A.R. alleged that CUSD personnel engaged in negligent conduct on campus that resulted in injury to A.R. off campus. The undisputed facts in this case support A.R.'s negligence theory of

liability. Because section 44808 does not immunize CUSD from liability under such a theory, the trial court erred in granting summary judgment. (*Hoyem, supra,* 22 Cal.3d at pp. 515-516; *Brownell, supra,* 4 Cal.App.4th at p. 795; *Perna, supra,* 143 Cal.App.3d at pp. 295-296.)

CUSD argues that we should disregard *Hoyem, supra,* 22 Cal.3d 508 and *Perna, supra,* 143 Cal.App.3d 292, which follows *Hoyem*, and, presumably, *Brownell, supra,* 4 Cal.App.4th 787, which also follows *Hoyem*, contending that "[t]hese cases are not persuasive because they are premised on an improper interpretation of section 44808 that has been rejected by a myriad of courts since these cases were decided." CUSD encourages us to "follow the 'consensus' of courts . . . which properly interpret section 44808 to always bar off-campus injuries 'absent a specific undertaking.'" We are bound to follow the Supreme Court's holding in *Hoyem,* as are the courts that CUSD asserts "reject" that holding and "properly" interpret section 44808. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) There is at least a triable issue of fact as to the applicability of section 44808.

DISPOSITION

The judgment is affirmed as to the trial court's ruling that A.R. improperly asserted a cause of action for intentional infliction of emotional distress in her second amended complaint that was not fairly reflected in the liability claim form she filed with CUSD and that A.R. could not maintain a separate cause of action for negligent infliction of emotional distress. The judgment is otherwise reversed and the matter is remanded to the trial court. A.R. is awarded her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

I concur:

KRIEGLER, J.

I concur in the judgment. I differ slightly from my colleagues as to why the judgment must be reversed. In my view, the ultimate outcome of this case is controlled by our decision in *Brownell v. Los Angeles Unified School Dist.* (1992) 4 Cal.App.4th 787, 791-798. In *Brownell*, a jury returned a verdict against the defendant school district. The basis of the suit in *Brownell* was that the plaintiff, a student, was shot by gang members while off campus. (*Id.* at p. 791.) We held the defendant exercised reasonable care in supervising students to protect them from gang activity. In *Brownell*, we held: "[The defendant] exercised reasonable and ordinary care and satisfied its duty to supervise adequately students in view of (1) the general precautions the school always took to minimize gang-related problems (e.g., prohibiting wearing gang colors and confiscating weapons), and (2) the absence of any advance indication to school personnel of potential gang violence pertinent to the incident involving Brownell. Although Johnson High School is located in a gang neighborhood and rival gangs attended the school with trouble ensuing on occasion in the school, it does not follow that the school had any duty to supervise to the extent of sending observers outside to scout the neighborhood for gang members off the campus and to wait until, so to speak, 'all was clear' before releasing the students." (*Id.* at pp. 796-797, fn. omitted.) There was no evidence in *Brownell* the defendant failed to comply with internal policies.

By contrast, here, defendant had no policies that expressly dealt with students who engaged in off-campus criminal sexual conduct with their peers. But defendant's general sexual harassment policies do apply to conduct which interferes with the educational environment. The off-campus sexual assault of R.R., the first reported victim, is conduct which can interfere with the educational environment. This is particularly true given that R.R. was required to attend the 2008 summer school class with her assailant. But when informed after July 2008 of the sexual assault of R.R., there is a triable issue as to whether any of defendant's employees complied with Claremont Unified School District Administrative Regulation 5145.7. Unlike *Brownell*, in our case there is a triable controversy as to whether defendant complied with its own policies.

In this sense, *Hoyem v. Manhattan Beach City School Dist.* (1978) 22 Cal.3d 508, 513-522 is of limited relevance. *Hoyem* is a case involving an appeal from a demurrer dismissal. (*Id*. at pp. 512, 523.) *Hoyem* does not evaluate factual showings presented at the summary judgment stage. Because it does not address our procedural scenario, *Hoyem* has limited precedential effect in the summary judgment context. (*People v. Banks* (1993) 6 Cal.4th 926, 945; *People v. Saunders* (1993) 5 Cal.4th 580, 592, fn. 8.) Thus, *Brownell*, which fully relies upon the legal analysis in *Hoyem* as do we, is the closest case to this one which arises after a summary judgment motion is granted.

Second, in terms of discretionary immunity, there is a triable controversy as to whether a policy or operational judgment was made when the assailant was not expelled in 2008. The Government Code section 820.2 immunity applies only to policy, not operational, decisions. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 981-982; *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1051.) Expulsion by a district administrator of a student is in my view an operational decision. Thus, I respectfully disagree with the analysis in other Court of Appeal decisions to the contrary. (*Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1361; *Skinner v. Vacaville Unified School Dist.* (1995) 37 Cal.App.4th 31, 39.) I would resolve the immunity issue on this ground. It bears emphasis that the trial court was bound by the *Thompson* and *Skinner* decisions which treat an expulsion decision as a policy determination. I am, with respect, not.

Finally, at oral argument, defense counsel argued there was no triable controversy as to whether defendant's conduct was a legal cause of A.R.'s injuries. There is a substantial body of authority concerning third-party criminality directed at a plaintiff which holds no liability arises on legal cause grounds. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 491; *Flores v. AutoZone West, Inc.* (2008) 161 Cal.App.4th 373, 385.) However, this was not a ground asserted in the summary judgment motion and thus has

been forfeited for purposes of this appeal. (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 873; *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29.)

TURNER, P. J.